Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 2)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–2566 OF 2010
ABU SAMAH, AZHAR MA'AH AND DAVID WONG JJCA
12 MARCH 2014

Civil Procedure — Appeal — Fact findings of — Whether findings amply supported by evidence — Whether no reason for appellate court to interfere with findings of fact

The appellant had filed two suits in the High Court against the respondents to recover monies owing to him for work done under two subcontracts. The second and third respondents ('R2 and R3') were sued as directors of the first respondent ('R1') on the allegation that they had, inter alia, dishonestly, fraudulently, wilfully or negligently caused the subcontract sums not to be released to the appellant or that they had siphoned off the assets of R1 in order not to pay the appellant his dues. The appellant succeeded in entering judgment against R1 in one of the suits. However, his claims against R2 and R3 in both the suits were dismissed as the High Court held that, in the first suit, the appellant's subcontract agreement was only with R1 and not with R2 and R3 and that, in the second suit, the evidence showed that it was not R1 which had awarded the appellant the subcontract, but another company in which the second and third respondents had no interests whatsoever. The instant appeal was against the dismissal of the claims against R2 and R3.

Held, dismissing the appeal:
The appellant's appeal was primarily based on findings of fact by the High Court. There was ample evidence to support the High Court's findings and there was no reason to interfere with the findings of fact. The court agreed with the High Court's decision that there was no evidence to show there were special circumstances, including actual fraud or some inequitable or unconscionable conduct amounting to fraud in equity, for the court to pierce the corporate veil. The standard of proof where there was an allegation of fraud was one of 'beyond reasonable doubt' which the appellant had failed to discharge (see paras 12–13).

[Bahasa Malaysia summary

Perayu telah memfailkan dua guaman di Mahkamah Tinggi terhadap responden-responden untuk mendapatkan semula wang yang terhutang kepadanya untuk kerja yang dilakukan di bawah dua subkontrak. Responden-responden kedua dan ketiga ('R2 dan R3') disaman sebagai

pengarah responden pertama ('R1') atas dakwaan bahawa mereka telah, antara lain, secara tidak jujur, menipu, dengan sengaja atau dengan cuai menyebabkan jumlah subkontrak tidak dibayar kepada perayu atau mereka telah menyalurkan keluar aset R1 untuk tidak membayar apa yang patut dibayar kepada perayu. Perayu berjaya dalam memasukkan penghakiman terhadap R1 dalam salah satu guaman tersebut. Walau bagaimanapun tuntutannya terhadap R2 dan R3 dalam kedua-dua guaman tersebut ditolak memandangkan Mahkamah Tinggi memutuskan bahawa dalam guaman pertama, perjanjian subkontrak perayu hanya dengan R1 dan bukan dengan R2 dan R3 oleh bahawa, dalam guaman kedua, keterangan menunjukkan bahawa ia bukan R1 yang mengawardkan perayu dengan subkontrak tersebut, tetapi syarikat lain di mana responden-responden kedua dan ketiga tidak mempunyai kepentingan apa-apa. Rayuan ini adalah terhadap R1 dan R3.

Diputuskan, menolak rayuan:

Rayuan perayu adalah terutamanya berdasarkan dapatan fakta oleh Mahkamah Tinggi. Terdapat keterangan yang mencukupi untuk menyokong dapatan Mahkamah Tinggi dan tiada sebab untuk campur tangan dengan dapatan fakta tersebut. Mahkamah bersetuju dengan keputusan Mahkamah Tinggi bahawa tiada keterangan untuk menunjukkan terdapat keadaan khas, termasuk penipuan sebenar atau kelakuan tidak adil atau tidak berhati perut menjumlahkan kepada penipuan dalam ekuiti, untuk mahkamah menyingkap tabir korporat. Standard pembuktian di mana terdapat dakwaan penipuan adalah satu 'beyond reasonable doubt' yang mana perayu telah gagal untuk membuktikannya (lihat perenggan 12–13).]

Notes

For cases on facts finding of, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1103–1238.

Cases referred to

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 s 71
Rules of the High Court 1980 O 14

Appeal from: Suit No K22–02 of 2006 (High Court, Kota Kinabalu)

Ting Sing Chuan (Ting Anuar & Co) for the appellant.
Ronny Cham (Ronny Cham & Co) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] The appellant/plaintiff was, at the material times, a subcontractor for the first respondent/first defendant. The second respondent/second defendant and the third respondent/third defendant were the directors of the first respondent.

[2] The appellant had filed two suits in the Kota Kinabalu High Court, namely suit No K22–194 of 2005 ('the 2005 suit') and suit No K22–2 of 2006 ('the 2006 suit') against the three respondents in respect of two separate contracts for the payment of the balance of contract sums for works done.

THE 2005 SUIT

[3] The claims in the 2005 suit was in respect of building works and civil works done in the construction of 'Ibu Pejabat Polis Daerah dan Perumahan' in Tenom, Sabah ('Tenom project'). The appellant had done and completed the said works. The respondents had not paid the balance sum due totalling RM2,123,056.15, despite repeated requests.

[4] On 26 November 2008 the appellant had entered a summary judgment under O 14 of the Rules of the High Court 1980 for the sum of RM2,123,056.15 against the first respondent. The trial in the 2005 suit was in respect of the appellant's claims against the second and third respondents only.

[5] The appellant's claims against the second and third respondents were for special damages in the sum of RM2,123,056.15 for wrongful conversion, misrepresentation, breach of trust and/or wrongful interference in the contract; and for general damages.

[6] The appellant had, among others, pleaded that the second and third respondents had dishonestly, fraudulently, wilfully or otherwise negligently represented to the appellant that the employer of the Tenom project ie Ministry of Home Affairs had not released the progress payments to the first respondent and thus no monies were then payable to the appellant or that no sufficient monies were received by the first respondent to pay the appellant.

[7] Alternatively, the appellant pleaded that the second and third respondents:

(a) had dishonestly, fraudulently or otherwise negligently caused the

contract sum not be released in accordance with the subcontract agreement and in the interest of justice the second and third respondents ought to be fully responsible to the appellant for the payment of the balance of the contract sum and the balance of the sum due for the civil works; or

(b) having the sole and effective control and management of the first respondent, had by unlawful design or means caused the first respondent not to release the payments received towards the subcontract sum and the civil works,

and had, by reason thereof caused the appellant to suffer loss and damages.

[8] The second and third respondents, in their defence, denied the claims and contended that the averments in the appellant's pleadings were untrue, vexatious, frivolous embarrassing and an abuse of the process of the court.

[9] The High Court dismissed the appellant's claims against the second and third respondents as it found that there was no contract between the appellant and the second and third respondents, who only acted in their capacities as directors of the first respondent. There was no separate and distinct liability on the part of the second and third respondents to pay the contract sums due and owing by the first respondent. The High Court found that the appellant had failed to adduce any reliable evidence that the second and third respondents had dishonestly, fraudulently, wilfully or otherwise represented to the appellant in the manner as pleaded in his statement of claim.

[10] The said findings of fact by the High Court were clearly stated in paras 8, 9 and 10 of its judgment:

> [8] The evidence showed that the subcontract agreement was between the plaintiff and the first defendant only. There was no contract between the plaintiff and the second and third defendants. The first defendant is a company and could only act through its directors who are the second and third defendants. There was no evidence to show that the second and third defendants were acting other than in their capacities as the directors of the first defendant company in their dealings with the plaintiff in the course of the subcontract. The plaintiff's reference to the figures in the yearly financial statements of the first defendant regarding other receivables and amount due from directors was not sufficient proof that the second and third defendants had siphoned off the assets of the first defendant in order not to pay the plaintiff.
>
> [9] The plaintiff had failed to adduce any reliable and cogent evidence that the second and third defendants had dishonesty, fraudulently, wilfully or otherwise negligently represented to the plaintiff that the employer did not release the progress payments and the first defendant was therefore unable to pay the plaintiff his progressive claims for the contract sums. The pleadings and the evidence clearly established that out of the total contract sums of RM11,046,025, the first defendant

had paid RM8,922,968.85 and that the balance sum of RM2,123,056.15 only was due and payable by the first defendant to the plaintiff.

[10] The plaintiff's remedy against the first defendant was for breach of contract and the plaintiff had obtained judgment against the first defendant for such breach for non-payment of the balance of the contract sums. Apart from the first defendant's contractual obligation to pay the balance of the contract sum, there was no separate and distinct liability on the part of the second and third defendants to pay the contract sums due and owing by the first defendant to the plaintiff. There was no separate and distinct remedy against the second and third defendants on the facts of this case.

[11] The appeal by the appellant was only against the decision of the High Court dismissing his claims against the second and third respondents. The second and third respondents did not cross-appeal against the High Court's decision dismissing their counterclaim.

[12] The appeal by the appellant was primarily based on the findings of fact by the High Court. We have read the appeal record and found that there were ample evidence to support the said findings. Thus there was no reason for us to interfere with the said findings of fact.

[13] We agreed with the decision of the High Court that there was no evidence to show that there were special circumstances including actual fraud or some inequitable or unconscionable conduct amounting to fraud in equity for the court to pierce the corporate veil: *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355, *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97. The standard of proof where there is an allegation of fraud is one of beyond any reasonable doubt: *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1, which the appellant had failed to discharge.

[14] Hence, we dismissed the appeal with costs.

THE SUIT 2006

[15] The appellant's claim against the first respondent was for the balance of subcontract sums amounting to RM333,086.10 for works done in respect of the construction of 14 units of teachers quarters including 16 units of toilets in Tamparuli ('Tamparuli project') for the Ministry of Education ('the employer'). The appellant alleged that the first respondent was the contractor for the Tamparuli project. The total subcontract sum was RM2,123,086.10.

[16] It was the appellant's pleaded case that the terms of the subcontract

between the appellant and the first respondent were contained in a copy of the letter from KM Piling and Construction Sdn Bhd dated 20 September 2002 signed by the second respondent. The appellant claimed that it did not have a copy of the written agreement for the subcontract with the first respondent because, after the appellant accepted the said letter, the second respondent informed the appellant that he would replace the said letter. This was not done.

[17] The second and third respondents were at all material times the only directors of the first respondent and had full control and management of the first respondent. The appellant alleged that the second and third respondents caused, procured or directed the appellant's subcontract sums not to be released in accordance with the said subcontract agreement.

[18] The appellant further pleaded that, in the interest of justice, the corporate veil of the first respondent should be lifted and that the second and third respondents be held as the alter ego of the first respondent based on the following particulars:

(a) the second and third respondents caused, procured or directed the subcontract sum to be applied otherwise than in strict compliance of the subcontract agreement;

(b) the second and third respondents had control and management of the first respondent; and

(c) the second and third respondents acted on their belief that only the first respondent could be sued and thus by delaying payments, they could siphon off the first respondent's assets.

[19] In addition to the balance sum of RM333,086.10 due under the subcontract agreement the appellant also claimed a sum of RM24,808 for additional works pursuant to respondents'oral requests.

[20] Alternatively, the appellant claimed against all the respondents compensation pursuant to s 71 of the Contracts Act 1950 in respect of the subcontract works and additional works.

[21] The respondents denied the appellant's claims. The first respondent pleaded that the contract for the Tamparuli project was awarded by the Ministry of Education to Sabatarget Sdn Bhd by a letter of award dated 2 September 2002 and not to KM Piling and Construction Sdn Bhd. The second respondent was only an employee and not a director or shareholder of KM Piling and Construction Sdn Bhd when he signed the said letter dated 20 September 2002 addressed to the appellant. The second respondent

resigned from KM Piling and Construction Sdn Bhd when the latter was not awarded the contract for the Tamparuli project.

[22] By a letter dated 24 September 2002 Sabatarget Sdn Bhd subcontracted the Tamparuli project to Wong Ho Construction Enterprise. The letter was for the attention of Wong Chu Lai.

[23] The High Court dismissed the appellant's claims against all the respondents with costs after finding that the appellant failed to prove its claims. The High Court ruled that the evidence showed that the Ministry of Education awarded the contract for the Tamparuli project to Sabatarget Sdn Bhd which, in turn subcontracted the project to Wong Ho Construction Enterprise (a firm) and not to the first respondent. Since the claims against the second and third respondents were as directors of the first respondent who had control and management of the first respondent, the contention that the corporate veil of the first respondent should be lifted could not be sustained for the same reason that there was no contract between the appellant and the first respondent. The findings of facts by the High Court can be found in paras 23, 24, 25, 26 and 27 of its judgment:

> [23] From the documents referred to during the trial, the evidence showed that the Ministry of Education (MOE) had awarded the Tamparuli project to Sabatarget Sdn Bhd which in turn had appointed Wong Ho Construction Enterprise as a subcontractor to carry out the project.
>
> [24] The evidence showed that the letter dated 20 September 2002 signed by the second defendant appointing the plaintiff as the subcontractor was from KM Piling & Construction Sdn Bhd. (KM Piling) and not from the first Defendant. At the material times the second defendant was not a shareholder or director of KM Piling.
>
> [25] The defendant had pleaded that KM Piling had also negotiated with Sabatarget Sdn Bhd to carry out the subcontract works and had given the letter dated 20 September 2002 to appoint the plaintiff to carry out the works on the expectation that it would be appointed as subcontractor by Sabatarget Sdn Bhd. The defendants pleaded that at the times, the second defendant was an employee of KM Piling.
>
> [26] The evidence showed that there was in fact no written subcontract agreement between the plaintiff and the first defendant. The evidence showed that the plaintiff was appointed and paid the progress payments for the works done by Wong Ho Construction Enterprise, which was a partnership firm, and not by the first defendant. Both the plaintiff and Wong Lee Sun confirmed that all the payments for the works done were made by Wong Ho Construction Enterprise in the Tamparuli project. There was no contract and no privity of contract between the plaintiff and the first defendant in this suit. The plaintiff's claims against the first defendant therefore could not be sustained.

[27] Since the claims against the second and third defendants were due to the fact that they were the directors of the first defendant and there should be a lifting of the corporate veil as such as pleaded and submitted by the plaintiff, the suit against them similarly failed for the same reason that there was no contract between the plaintiff and the first defendant.

[24] We have perused the records of appeal and found that the findings of the fact by the High Court was supported by the evidence before it. The basis of the appellant's claim was based on the letter from KM Piling and Construction Sdn Bhd signed by the second respondent who was then an employee of KM Piling and Construction Sdn Bhd. KM Piling and Construction Sdn Bhd was never awarded the contract for the Tamparuli project. The appellant admitted in his pleading that it did not have a copy of the subcontract agreement with the first respondent. The appellant's own witness, Wong Lee Sun ('PW1') testified both in cross-examination and re-examination that Wong Ho Construction Enterprise paid for the works done by the appellant. We have therefore no reasons to intervene with the findings of the fact by the High Court. For the abovesaid reasons we dismissed the appeal with costs.

Appeal dismissed.

Reported by Ashok Kumar